IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

UNITED STATES OF AMERICA,	)	
	)	Case No. 1:08CR00024-035
	)	
v.	)	**OPINION AND ORDER**
	)	
	)	By: James P. Jones
MARTIN AVERY HUGHES,	)	Chief United States District Judge
	)	
Defendant.	)	

Martin Avery Hughes, Pro Se Defendant.

The defendant has filed pro se motions in his closed criminal proceedings, seeking dismissal of the indictment and suppression or exclusion of certain evidence, based on recanting statements by some of his codefendants.[1] For lack of cause shown, his motions must be denied.

I

Martin Avery Hughes pleaded guilty on October 27, 2008, pursuant to a written Plea Agreement, to a charge of conspiracy to possess with intent to distribute and

[1] In conjunction with these motions, the defendant has also filed a Motion to Compel and a Motion for Preparation of Transcripts, in which he seeks production of all the government's evidence against him and free copies of transcripts of testimony offered by several of his codefendants in grand jury and other pretrial proceedings.

distribute fifty grams or more of cocaine base, in violation of 21 U.S.C.A. §§ 841(b)(1)(A), 846 (West 1999 & Supp. 2009). Pursuant to section B(2) of the Plea Agreement, Hughes stipulated that he had been convicted of one prior felony drug offense that could be used to enhance his sentence, and the government agreed not to seek additional enhancement based on two additional prior felony drug offenses.[2]

In section B(3) of the agreement, Hughes also stipulated that the Career Offender guideline, United States Sentencing Manual § 4B1.1 (2007), was applicable to him, and that he would not seek a sentence outside of the guideline range. Finally, pursuant to sections C(2) and (3) of the Plea Agreement, Hughes waived his right to appeal and his right to collaterally attack "any order issued in this matter."[3] In exchange for the guilty plea, the government also moved to dismiss a second criminal charge against Hughes.

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[2] Without this Plea Agreement provision, Hughes would have been subject to a mandatory life sentence, pursuant to 21 U.S.C.A. § 841(b)(1)(A) (providing for mandatory minimum sentence of twenty years if there is a prior felony drug conviction and for a mandatory minimum sentence of life imprisonment without release if there are two or more prior felony drug convictions).

[3] Section C(3) of the Plea Agreement stated that if Hughes files "any court document seeking to disturb, in any way, any order imposed in [his] case," the government will consider such action to be a violation of the agreement and will be free to take any action described in Section D, entitled "Remedies Available to the United States." Section D provides that, if Hughes breaches any term of the Plea Agreement, the government may, among other things, reinstate any dismissed charges and refuse to comply with stipulations as to sentencing. Hughes is advised that a motion under 28 U.S.C.A. § 2255 is considered a collateral attack on the judgment.

Prior to accepting the plea of guilty, I questioned Hughes as to his understanding of the agreement and its consequences, the elements of the charge, and the rights he was waiving by pleading guilty under the agreement. He indicated that he had initialed each page and signed the agreement to show that he had read it after an adequate opportunity to review it with his attorney. After the prosecutor reviewed the terms of the agreement, Hughes affirmed that he understood those terms. I asked Hughes, "Are you pleading guilty because you are in fact guilty of this charge?" Hughes answered, "Yes, sir." (Plea Hr'g Tr. 22, Oct. 27, 2008.)

The prosecutor then reviewed the evidence that the government would have presented had the case gone to trial against Hughes. I asked Hughes if he contested any of the facts as recited by the prosecutor, and Hughes answered, "No, sir." (*Id.* at 25-26.) I found that Hughes was fully competent to enter a guilty plea, that he was aware of the nature of the charge and the consequences of his plea, and that his plea was knowing and voluntary and supported by an independent basis in fact as to each of the essential elements of the offense.

In January 2009, Hughes filed a pro se motion seeking appointment of new counsel, but after consultation with his current attorney and a hearing with the magistrate judge, withdrew this motion. Then, in mid-February 2009, Hughes wrote letters to the court, making allegations similar to the ones raised in his current

motions regarding codefendants' admissions to lying under oath, and filed pro se motions seeking to withdraw his guilty plea and to have new counsel appointed. The government then filed a notice, informing Hughes and the court that if Hughes persisted in his attempt to withdraw his guilty plea, the government would consider his action to be a breach of the Plea Agreement and would pursue the remedies authorized under Section D, including but not limited to refusing to dismiss his prior convictions from the sentence enhancement Information, thus subjecting Hughes to a life sentence, and refusing to recommend any sentence reduction for acceptance of responsibility. After consultation with his attorney, Hughes withdrew his motions. On March 2, 2009, I sentenced Hughes to 262 months imprisonment. He did not appeal.

A few weeks later, Hughes filed his Motion to Dismiss the Indictment and Motion to Suppress/Exclude Evidence. He argues that based on facts discovered after entry of his guilty plea, the evidence offered against him in support of the Indictment is not reliable, so the court may simply dismiss the indictment. Specifically, he lists the following items of information that he now considers to be suspect: (1) on April 21, 2008, the law enforcement agent who signed the affidavit in support of the original criminal complaint admitted that he had put some statements by codefendants "in his own words"; (2) some of the statements by a confidential source as described

in the affidavit do not identify all participants in each drug transaction; at least one transaction described in the affidavit, implicating Hughes, occurred when Hughes was incarcerated; (3) Robert Meade, who is not a credible witness, was the only source of evidence as to one drug transaction alleged in the affidavit against Hughes; (4) on March 6, 2009, Paul Vaughn, a major source of information for the government in this investigation, admitted that he had lied during his grand jury testimony and during two jury trials against codefendants in this case; (5) other witnesses with prior bad acts had motives to lie and cooperate with the government; (6) another codefendant, Marcus Watkins, submitted letters and an affidavit to the court, indicating that he had lied during proffers to investigators and during trials of codefendants; and (7) the drug weight attributed to Hughes in his Presentence Investigation Report was unreliable, because it was based on statements by Vaughn and Meade.[4]

[4] Hughes's codefendants who had elected to go to trial instead of pleading guilty filed motions for new trial, based on the witnesses' admissions of perjury. I conducted an evidentiary hearing on June 18, 2009, during which Vaughn, Watkins, and Derrick Evans testified that they had lied during prior testimony. Thereafter, in light of all the evidence, I found that these individuals were not being truthful when they claimed to have previously lied. Accordingly, I denied all the motions for new trials. *See United States v. Duty*, No. 1:08CR00024, 2009 WL 2424347 (W.D. Va. Aug. 6, 2009); *United States v. Baumgardner*, No. 1:08CR00024, 2009 WL 2424334 (W.D. Va. Aug. 6, 2009); *see also United States v. Vaughn*, No. 1:08CR00024, 2009 WL 2762159 (W.D. Va. Aug. 27, 2009) (denying motion to withdraw guilty plea); *United States v. Evans*, 635 F. Supp. 2d 455, 464 (W.D. Va. 2009) (same) .

II

Hughes seeks to reopen the criminal proceedings because he now believes the evidence offered in support of the Indictment and his own guilty plea and sentence is unreliable for various reasons. He also moves to suppress or exclude various pieces of evidence from any future attempts to indict or prosecute him. Hughes fails to offer any authority under which he is now entitled to such relief.

The court decisions that Hughes cites in support of his motions involve cases in which the prosecuting officials discovered *before trial* or *after a mistrial* that a witness who had testified before a grand jury had committed perjury and moved to dismiss the indictment. *See, e.g., United States v. Guillett*, 547 F.2d 743, 752-53 (2d Cir. 1976); *United States v. Goldman*, 451 F. Supp. 518, 521 (S.D.N.Y. 1978). The circumstances in these cases are different than those under which Hughes brings his claims. Hughes "discovered" the new evidence on which he relies only after he chose not to have a trial and pleaded guilty.

"When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Thus,

by entering his valid guilty plea, Hughes waived his right to challenge constitutional defects that occurred before the plea, such as the alleged defects with the indictment and the evidence offered to support his guilty plea. At most, at this late date in the criminal proceedings, Hughes may challenge only the validity of the guilty plea itself.

Federal Rule of Criminal Procedure 11(d)(2)(B) permits the withdrawal of a plea of guilty after acceptance of the guilty plea but *before sentencing* if "the defendant can show a fair and just reason for requesting the withdrawal." After the court imposes sentence, however, "the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack." Rule 11(e). Because Hughes did not bring his current motions before sentencing, I cannot construe or consider them as seeking to vacate his guilty plea under Rule 11(e).

Rule 33(b)(1) authorizes defendants to file a motion for new trial based on newly discovered evidence within three years of the entry of judgment. Hughes does not qualify to proceed under this rule, however, because he never had a trial; rather, he waived his right to trial when he pleaded guilty. *See United States v. Graciani*, 61 F.3d 70, 78 (1st Cir. 1995) (finding that validity of guilty plea cannot be questioned by way of motion for new trial); *United States v. Lambert*, 603 F.2d 808, 809 (10th Cir. 1979) (finding that Rule 33 "applies only to cases in which a [t]rial, either to the

court or to a jury, has taken place"); *United States v. Blackwell*, No. 3:04CR00040, 2008 WL 318291, at *3 (W.D. Va. Feb. 4, 2008) (same). Therefore, I cannot construe or consider Hughes' motions as seeking a new trial under Rule 33(b)(1).

I could construe and consider Hughes's motions as a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C.A. § 2255 (West 2006 & Supp. 2009). To state a claim for relief under § 2255, a defendant must prove that one of the following occurred: (1) his sentence was "imposed in violation of the Constitution or laws of the United States"; (2) that "the court was without jurisdiction to impose such a sentence"; or (3) that "the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C.A. § 2255(a). Under sections C(3) of his written Plea Agreement, however, Hughes waived "any right [he might] have to collaterally attack, in any future proceeding, any order issued in this matter." Accordingly, I will not construe Hughes's motions as seeking collateral relief under § 2255.[5]

For these reasons, I find no authority under which Hughes is entitled to disturb the finality of the judgment against him. Furthermore, because the criminal proceedings are closed and Hughes has waived his right to appeal, I do not find that

[5] Moreover, Hughes recently filed a motion styled as arising under § 2255, but then moved to dismiss it, stating that he did not intend to file it as a § 2255 motion. The motion was dismissed without prejudice. (DE 2314, 2394.)

Hughes is entitled to compel discovery or to obtain a copy of any transcript at government expense in conjunction with any motion or appeal. I will therefore deny his motions seeking production of these items.

III

For the stated reasons, it is **ORDERED** that the defendant's pending motions (DE 1741, 1927, 1928, and 1929) are DENIED.

ENTER: March 3, 2010

/s/ JAMES P. JONES
Chief United States District Judge